No. 80-591

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALAD ELECTRIC HEATING CORPORATION,

Appellant,

vs.

TED R. BROWN & ASSOCIATES, INC. and MALLORY ENGINEERING, INC.,

Appellees.

On Appeal from the Supreme Court of Utah

JURISDICTIONAL STATEMENT

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October 8, 1980

1(a) Questions Presented

1. Whether, under the Utah "Long Arm" Statute as construed by the Supreme Court of the State of Utah, the courts in that State had, consistently with the Due Process Clause of the Fourteenth Amendment, jurisdiction over Appellant which was at no time legally present within Utah's forum and never had any "minimum contacts" with that forum; and in view of the fact that assertion of jurisdiction over Appellant offends "traditional notions of fair play and substantial justice"?

2. Whether the complete disregard by the Utah courts of the only contract (Exhibit 83) which can be isolated from the Record violates due process and "traditional notions of fair play and substantial justice" under the Fourteenth Amendment of the Constitution of the United States; since the decision and judgment asserting breach of contract by Appellant were based on no identified contract and no contract formation showing the mutual assent required by due process as a prerequisite to liability thereunder?

3. Whether, consistently with due process, the Utah courts may completely disregard, as did Appellees, the clear written contract (constituted by Exhibit 83) which was concluded between Appellant and Brown, a contract which, without denial challenge in the Record, was fully performed according to its terms by Appellant; and which contained Appellees' order to Appellant to proceed with manufacture and delivery in accordance with the Exhibit 83?

Parties

1(b). The caption of the case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of Utah.*

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* ppellee, Ted R. Brown & Associates, Inc., is hereinafter sometimes referred to as "Brown"; Appellee Mallory Engineering, Inc., as "Mallory"; and Appellant, Valad Electric Heating Corporation, as "Valad". The Transcript of the trial is cited as "T", followed of the State of Utah, as "R", followed by the page number.
by the page number; and the Record before the Supreme Court

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALAD ELECTRIC HEATING CORPORATION,

Appellant,

vs.

TED R. BROWN & ASSOCIATES, INC. and MALLORY ENGINEERING, INC.,

Appellees.

On Appeal from the Supreme Court of Utah

JURISDICTIONAL STATEMENT

1(d). The opinion below is cited as

1(e). Grounds on which jurisdiction of this Court is invoked.

(i) *The nature of the proceeding.* It originated in an action for breach of contract in the Third District Court

of Salt Lake County, Utah, by Appellee, Mallory Engineering, Inc., a Utah resident, to recover damages against Appellee, Ted R. Brown & Associates, Inc., a Utah resident, and against Appellant, Valad Electric Heating Corporation, a New York resident. The complaint did not set forth the terms of any oral or written contract between Mallory and Brown or between Brown and Valad. No contract appears in the Record except the written contract (Exhibit 83) on the basis of which Valad was authorized by Appellees to construct the involved electrical heaters. There was no allegation in the complaint and no proof in the Record that Valad deviated in any way from said contract (Exhibit 83). After trial, judgment was against Appellant, which duly appealed to the Utah Supreme Court.

(ii) The *date of entry of the judgment sought to be reviewed* was March 6, 1980; the *date of entry of the order denying rehearing* was July 10, 1980; the date of the Notice of appeal filed with the Supreme Court of the State of Utah was September 26, 1980, and filed with the Third District Court on . No cross-appeal is involved.

(iii) The *statutory provision conferring jurisdiction on appeal* in this case is 28 U.S.C. §1257 (2): *Williams* v. *Bruffy,* 96 US 176, 24 L Ed 716; *Largent* v. *Texas,* 318 US 418, 63 S.Ct. 667, 87 L Ed 873; *Louisville & Nashville R.R. Co.* v. *Higdon,* 234 US 592, 34 S.Ct. 948, 58 L Ed 1484.

1(f). The constitutional provision involved is part of §1 of the Fourteenth Amendment.

> "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State de-

prive any person of life, liberty or property without due process of law * * *".

1(g). Statement of the Case.

In January, 1972 (T. 358, 362) Brown, Valad's vendee, canvassed various manufacturers of heating equipment, which it wanted to sell to Mallory (T. 75, 358-360, 219-222). In November, 1972, Brown contacted Valad (T. 97-99) with whom it had never before dealt. Preliminary inquiries by telephone and letters (T. 74, 240-242, 252-275, 326-332, 351-352, 358-359, 364-400) resulted in a written contract (Exhibit 83). There never was any contract between Mallory and Valad, a fact which Appellees never challenged.

On January 19, 1973, Valad sent to Brown (represented by Nyman) its letter of that date (Exhibit 17) enclosing two copies of Valad's drawing #73-119, dated "1/73". On Nyman's specific instructions, a copy of this letter was sent by Valad to Mallory (T. 409). Neither this letter nor the drawings enclosed with it said anything about performance standards.

Exhibit 18, Valad's letter dated January 22, 1973, was sent with two copies of Valad drawing #73-120. Both the letter of January 19, 1973 and that of January 22, 1973, with their respective drawings, constituted contract *offers* by Valad to build heaters conforming to those drawings.

Exhibits 20 and 83, dated January 26, 1973 (Exhibit 83 is the original; and Exhibit 20 is a copy of the same document) are Nyman's (Brown's) speedletter enclosing the two Valad drawings (#73-119 and #73-120) which Brown had somewhat modified by annotations and comments in

Nyman's writing, showing that Brown would accept Valad's offers described in the previous paragraph, if the annotated changes were made (and they were made) . In other words, Exhibit 83 was Brown's *counter-offer* (T. 411-412, 429-430, 451-453), which Valad promptly accepted by telephone from New York, and conformably to which it constructed and sold the involved heaters. That acceptance formed the only contract in the Record.

Nowhere in the Trial Courts' Findings of Fact or Conclusions of Law is there any statement which indicates *when* a contract between Valad and Brown eventuated or *what* the terms of that contract were. Apparently, Findings numbered 4 through 9 were written on the mere *assumption* that Brown's Purchase Order #6730 (dated December 15, 1972), as supplemented and amended by Brown's letter dated December 20, 1972 (Exhibit 11) constituted a contract. No Record evidence even suggests that Valad ever accepted Brown's P.O. #6730 or its addendum dated December 20, 1972. Valad never accepted either of them at any time. Each was incomplete without the other, as Exhibit 11 shows. Both were superseded a few days later by Exhibit 83. Moreover, the *assumption* that Valad accepted Exhibits 10 and 11 (Browns' purchase) does not explain the subsequent reciprocal inquiries *about the structure of the heaters* which had continued from December 15, 1972 to January 26, 1973, when Brown sent its speedletter enclosing Valad's annotated drawings (Exhibit 83). Nor does that *assumption* explain Exhibit 83.

The Findings show no *contract formation* nor the precise terms and conditions of the "contract" on which the Trial Court relied to find that Valad had breached it. The most important document in case (Exhibit 83) was completely neglected by the Trial Court. Yet, apart from that document and its acceptance by Valad, there is absolutely no evidence in the Record of any other mutual

assent, contract or meeting of minds. Mallory, Brown and the Trial Court have this in common: they never alleged what *offer* Valad is supposed to have accepted from Brown prior to January 26, 1973, to form a plausible *contract to sell,* obligating Valad.*

Valad manufactured pursuant to Exhibit 83 and shipped in March, 1973 (T. 36, 713). Later, Mallory installed the heaters and notified Brown of its dissatisfaction with them (T. 241, 415). Then, for the first time, Mallory contacted Valad (T. 74-75). Mallory's dissatisfaction was eventually translated into the complaint aforesaid. The case was tried in the Third Judicial District Court of Salt Lake County, Utah, in January 1976. After evidence on liability had been presented, the Trial Court ruled that Mallory did not get what it thought it was going to get with respect to the heaters; and that the preponderance of evidence showed that Valad was required to furnish a type of heater which it did not furnish (T. 620). The next day the Trial Court reversed itself somewhat and said that it had not intended to rule absolutely that Valad was liable (T. 620). After at first rejecting a proposal by Valad's attorneys that post-trial briefs be filed, the Trial Court later agreed to accept them, but said:

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* An attempt was made to convert unaccepted offers, such as Exhibit 9 and/or Exhibit 10, which were *naked* purchase orders for non-existent goods (i.e. "future goods" under the Uniform Commercial Code) and which Valad never accepted or agreed to accept, as the Record shows. Exhibit 10 (Brown's P.O. #6730 to Valad) was materially different from Exhibit 9 (Mallory's P.O. to Brown). But Valad at no time accepted either of these purchase orders. Nowhere in the Record does Brown or Mallory flatly make even that contention (which is not part of the Findings of Fact either).

> "As between the Plaintiff and the Defendant Valad, I indicated in chambers that I felt that the burden of persuasion in view of my rulings would be upon Valad to persuade me that they were not liable (T. 631-632).

Apparently, under Utah Law as construed by the Trial Court, Valad had the burden of proof. On April 5, 1977, all counsel met with the Trial Court and agreed (pursuant to practice in Utah) *as to the form* of ceratin findings of fact and conclusions of law (T. 641), without waiving any objections to them.

The complaint had been filed September 20, 1973; and was served upon Valad pursuant to Utah's "Long Arm" Statute (U.C.A. 1953 §§ 78-27-22 through 24) in Tarrytown, New York (R. 9, 11).

On November 1, 1973, Valad responded *pro se* with a single document comprising two parts: (1) Answer, counterclaim and cross-complaint (R. 23) and an "Answer" (R. 24-33) which duly raised jurisdictional defenses (R. 25-27).

On April 14, 1975, Valad filed a "Special Appearance" (R. 125-126) and an affidavit (R. 137-141) treated by the court as a motion to quash service of summons (R. 142, 170). This motion was denied on April 28, 1975 (R. 170). The affidavit specifically denied the presence in Utah of Valad's agents, sales office, bank accounts and advertising and other contacts. It showed that its single contractual transaction with Brown was an isolated occurrence. The affidavit is set forth in the Appendix. It was never denied or challenged.

On May 12, 1975, Valad filed its Notice of Appeal (R. 173) to the Utah Supreme Court and a petition for interlocutory appeal on the issue of jurisdiction on May 23,

1975 (Utah S.Ct. No. 14102). The court below granted Brown's motion to dismiss the interlocutory appeal but specifically reserved the issue of personal jurisdiction for ultimate appeal (R. 178). The remittitur renderd interlocutory appeal by Valad moot (R. 178). The Transcript shows there were no "minimal contacts" (T. 360).

Stages in the proceedings below at which the questions sought to be reviewed were raised. Valad raised the *constitutional question with respect to the "agreement"* on which the Trial Court relied at page 14 of its post-trial brief, and at p. 20 of "Brief of Appellant Valad" submitted to Utah Supreme Court.

Valad raised its *constitutional objections to assumption of jurisdiction by the Utah courts* in the State District Court in 1973 in Valad's "Memorandum in Support of Objections to Personal Jurisdiction", and in its "Brief in Support of Appellant Valad's Petition for Rehearing" in the Utah Supreme Court (No. 15530). The decision of the Utah Supreme Court itself considered this basic issue. *Manhattan Life Ins. Co.* v. *Cohen* (1914), 234 U.S. 123, 58 L.Ed. 1245, 34 S.Ct. 874.

1(h). Reasons why the questions presented are substantial.

A. *As to the jurisdictional issue,* Valad never did business in Utah. It ships and sells no products to that State; purchases no advertisements in any media calculated to reach Utah; derives no revenue from goods used or consumed in Utah; has no minimum contacts with Utah; does not and did not avail itself of the privileges and immunities of Utah law; does not and did not solicit business there, either through advertising or sales representatives or in any other way; does not and did not serve or seek to serve the Utah market; and does not and did not de-

liver its products into the stream of commerce with the expectation or likelihood that those products will be purchased by consumers in Utah. The sale to Brown, based on precise construction drawings (Exhibit 83) was simply an isolated transaction. Valad owns no property in Utah; is not engaged in any purposeful activity in or related to the Utah forum, such as would make Utah's exercise of jurisdiction fair, just or reasonable; has no significant contacts with Utah or its forum; and the litigation below never exhibited such contacts. The Due Process Clause as construed by this Court does not contemplate that Utah can, in the circumstances, make a binding judgment against Valad (or against any non-resident similarly situated); since Valad has no contacts, ties or relations with Utah. *World-Wide Volkswagen Corporation* v. *Woodson,* —— U.S. ——, 62 L.Ed. 490, 100 S.Ct. —— and *Rush* v. *Savchuk,* —— U.S. ——, 62 L.Ed.2d 519, 100 S.Ct. ——. The Supreme Court of Utah has disregarded the criteria in these cases. It has, instead, used as the basis for its decision the legislative "statement of the purpose" of the Utah "Long Arm" Statute (quoted on pages 2 and 3 of its decision); and the "legislative mandate" of the Utah Legislature (quoted on page 9 of its decision). Utah has reached out beyond the limits imposed on it by its status as a co-equal sovereign in a federal system, primarily in the interest of providing its citizens "with an effective means of recourse against non-resident persons".

In *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945) 66 S.Ct. 154, 90 L.Ed. 95, 161 ALR 1057, this Court held that due process required only that the non-resident corporation "have certain minimum contacts with it [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice". (326 US at 316 (1945). There, the Shoe company systematically and continually employed a

corps of salesmen in the State of Washington and assiduously solicited businss in that State, permitting its salesmen to rent quaters for the display of merchandise. Valad never did any of these things. Yet Utah's jurisdiction was imposed on it, causing it (and others like it) several kinds of hardship and inconvenience, under the doctrine espoused by Utah's Supreme Court: (i) liability under a contract *concluded in New York* without applying New York law; (ii) the need to defend in Utah on the basis of a business suit predicated on a single contract of sale; (iii) liability under an undefined and unspecified "contract" as to which *contract formation* was not shown and cannot be shown; (iv) subjection to a Utah decision which applied Utah law to a disregarded but actual contract (Exhibit 83) concluded in New York State (whose law should have been applied); and (v) tolerance of the Trial Court's view on burden of proof (T. 631-632). These exposures to indeterminate and inequitable liability are not "fair play" nor "substantial justice" nor due process vis-a-vis non-residents.

B. *As to the contractual aspects of this case,* Utah has neglected the principle, nationally important to business everywhere, that there can be no contract liability, in compliance with constitutional due process, where the minds of the parties have not met on a specific, identifiable contract. The unspecified and unidentified "contract," on which the decisions below were based, imposed upon Valad was no contract and cannot be located in the Transcript of the Record. *Hearne* v. *New England Mutual Insurance Company,* 20 Wall 488, 22 L Ed 395; *Utley* v. *Donaldson,* 94 US 29, 24 L Ed 54; *Holder* v. *Aultman, M. & Co.,* 169 US 81, 18 S.Ct. 269, 42 L Ed 669. Mutual assent to the terms of a contract is the very essence of a contract; and it is required by due process as a prerequisite to liability under a contract. *Louisiana ex rel Folsom* v. *New Orleans,* 109 US 285, 3 S.Ct. 211, 27 L Ed 936; *United States* v. *Ellicott,* 223 US 524, 82 S.Ct. 334, 56 L Ed 535.

Only Exhibit 83 supplied that mutual assent.

1(i). No injunction is involved in this case.

1(j). Appendix.

(i) The Decision of the Supreme Court of the State of Utah and concurring and dissenting opinions. It made no findings of fact or conclusions of 'aw.

(ii) The Trial Court rendered no opinion; but it did sign an Amended Judgment.

(iii) The copy of Order denying rehearing which shows its caption and date of entry in the Supreme Court of the State of Utah.

(iv) A copy of the Notice of Appeal showing the date filed and the court where filed.

(v) A copy of the complaint upon which the trial was based.

(vi) Exhibit 83.

(vii) Affidavit of Peter Cecchini (Valad) re jurisdiction, submitted below.

(viii) Order denying Valad's "motion to quash service of summons and complaint.

(ix) Trial Court's Findings of Fact and Conclusions of Law.

(x) Excerpts from the Transcript.

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APPENDIX

Decision of the Supreme Court of the State of Utah

IN THE

SUPREME COURT

OF THE STATE OF UTAH

No. 15530

(Filed—March 6, 1980)

MALLORY ENGINEERING, INC.,

Plaintiffs and Respondent,

v.

TED R. BROWN & ASSOCIATES, INC.,

Defendant, Crossclaimant,
Repondent Defendant to
Valad's Counterclaim and
Appellant,

and

VALAD ELECTRIC HEATING CORP.,

Defendant, Cross-Defendant,
Countercaimant and Appellant.

GEOFFREY J. BUTLER, CLERK

Decision of the Supreme Court of the State of Utah

MAUGHAN, *Justice*:

This appeal is brought from a judgment of the Third District Court of Salt Lake County, which awarded damages to the plaintiff for a manufacturer's breach of a contract to supply goods within the State. The district court also awarded the plaintiff damages against a third party supplier, but granted the supplier a judgment against the manufacturer to indemnify his liability to the plaintiff and cover the supplier's losses resulting from the manufacturer's breach. We affirm. All statutory references are to Utah Code Ann., 1953, as amended. Costs awarded to Mallory Engineering, Inc., and Ted R. Brown & Associates, Inc., against Valad Electric Heating Corp.

This case concerns a series of bifurcated commercial transactions involving plaintiff, Mallory Engineering, Inc. (hereafter Mallory), and defendants, Ted R. Brown & Associates, Inc. (hereafter Brown) and Valad Electric Heating Corp. (hereafter Valad). In the latter part of 1972 and the early part of 1973, Mallory, which is a Utah corporation with its principal place of business in Salt Lake City, Utah, had certain contract commitments to manufacture for the United States government some specially designed environmental units. Following preliminary negotiations, Mallory contracted with Brown, a Utah corporation, with its principal place of business in Salt Lake City, Utah, for the supply of certain heating units of precise and exacting specification for use in the environmental units. Thereafter Brown entered into an agreement with Valad, a New York corporation, with its principal place of business in Tarrytown, New York, for the manufacture and subsequent delivery to Mallory of the requisite heating units. As the manufacturer, Valad issued to Mallory, on March 13, 1973, a Certificate of Certification for two of the

several heating models. The heating units manufactured by Valad and supplied by Brown were found by Mallory to be defective. While Valad furnished replacements for one model which Mallory employed in its production, the remaining defective models were not replaced. Also, some ordered models were never received by Mallory.

The district court found, concerning the defective units that were not repaced and the nondelivered heating units, Brown breached its agreement with Mallory and Valad breached its agreement with Brown. The district court granted Mallory judgment against Brown and Valad. The court also awarded to Brown judgment against Valad.

The crucial issue presented by this appeal involves the amenability of Valad, a nonresident defendant, to the jurisdiction of the Utah state courts. The Utah, "Long Arm Statute." §78-27-24 provides:

> Any person[1] . . . whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
>
> * * *
>
> (2) Contracting to supply services or goods in this state;

The broad dictate of this legislative grant of jurisdiction is explained in the legislative statement of the purpose of the act as found in §78-27-22:

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[1] Under §78-27-23, the words "any person" are defined as "any individual, firm, company, association, or corporation."

> It is declared, as a matter of legislative determination, that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. . . .
>
> The provisions of this act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.

Although early decisions concerning the scope of this legislation applied a restrictive interpretation,[2] this Court's most recent decisions recognize the expansive grant of jur-

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[2] See *Hill* v. *Zale Corp.*, 25 Utah 2d 357, 482 P.2d 332 (1971); see also *Packaging Corp. of America* v. *Morris*, Utah, 561 P.2d 680 (1977); *Cate Rental Co. Inc.* v. *Whalen & Co.*, Utah, 549 P.2d 707 (1976). This restrictive approach was characterized by the retention of the "conducting business" standard which formed one of the bases for jurisdiction over non-resident defendants prior to the enactment of §78-27-24. This standard was based on the "presence" rationale first explained in *Pennoyer* v. *Neff*, 96 U.S. 417 (1877). Under this standard, to substantiate jurisdiction over a non-resident defendant, the court required the defendant to engage in some substantial activity with some degree of continuity within the state. The early integration of this standard into the Long Arm Statute is aptly evidenced by the court's statement in *Hill* v. *Zale Corp.*, id., at 334, "if there is any difference between what is stated as the 'doing business' and the 'minimum contacts' test, it is probably more in semantics than substance."

isdictional power which the legislation embodies. As we explained in Abbott G.M. Diesel, Inc. v. Piper Aircraft:[3]

> Because our legislature in 1969 declared in clear, specific and mandatory terms that the scope of that personal jurisdiction should be enlarged to the fullest extent permitted by the due process clause of the Fourteenth Amendment, this Court herein acknowledges that this state's jurisdictional standard should not be more restrictive than those allowed by federal due process limitations.[4]

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[3] *Abbott G.M. Diesel, Inc.* v. *Piper Aircraft Corp.*, Utah, 578 P.2d 850, 853 (1978).

[4] In response to this recognition of the legislative mandate, this Court has recognized the distinction between the "minimal contact" and "doing business" standard. In *Abbott*, id., the court explained, "While it is true that this court has stated that 'if there is any difference between what is stated as the "doing business" and "minimal contact" test, it is probably more in semantics than in substance,' we now conclude . . . there can well be a significant and controlling difference in these two concepts." at 852-53. The significance of the difference is found in part in the distinction between general jurisdiction and special jurisdiction. If the defendant's nexus with the state is such that he is "doing business" in the state, the jurisdiction of the court applies generally and he is rendered amenable in the state courts for any cause of action. This jurisdictional standard is embodied in U.R.C.P. §4(e)(4), and the Long Arm Statute need not be employed. Conversely, if the activities of the defendant are limited in nature or transitory in duration, the courts may assume jurisdiction over that person only in relation to causes of action related to the activity of the defendant in the state. To assume this "special" jurisdiction, the courts must employ the Long Arm Statute. See *Producer's Livestock Loan Co.* v. *Miller*, Utah, 580 P.2d 603, 605 (1978); see generally Shrachan, Kristine, *In Personam Jurisdiction In Utah*, 1977 U.L.Rev. 235 (1977).

The definition of these due process limitations on personal jurisdiction was initially addressed by the United State Supreme Court in International Shoe Company v. Washington.[5] The Court explained:

> Due process requires only that in order to subject the defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

This abstract notion of "fair play and substantial justice" must be viewed as encompassing the fundamental requirements of procedural due process, i.e., notice and an opportunity to be heard. This relationship was recognized by the Supreme Court in Milliken v. Meyer,[6] where the Court explained:

> Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service [or long arm jurisdiction] provided for such cases and employed is reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice (McDonald v. Mabee, supra)[7] implicit in due process are satisfied.

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[5] *International Shoe Co.* v. *Washington* 326 U.S. 310 (1945).

[6] *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940).

[7] This reference to *McDonald* v. *Mabee*, 243 U.S. 90 (1917) is particularly illustrative of the general requirements of "fair play

(Footnote continued on following page)

These fundamental underpinnings of procedural due process[8] are implicitly recognized by the International Shoe delineation of the "minimal contact" standard. Explaining the requirements of the standard, the Court stated:

> Whether due process is satisfied or not must depend rather [than upon the mechanical or quantita-

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(Footnote continued from preceding page)

and substantial justice" in relation to procedural due process. Particularly relevant to an understanding of the "minimum contact" standard is the Court's statement: "The foundation of jurisdiction is physical power . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind. Subject to its conception of sovereignty, even the common law required a judgment not to be contrary to natural justice. . . . And in states bound together by a constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction (of power over the person of the defendant) deny the fair play that can be secured only by a pretty close adhesion to fact."

[8] The United States Supreme Court explained the foundations of these procedural due process requirements in *Fuentes* v. *Shevin*, 407 U.S. 67, 80-81 (1971): "The constitutional right to be heard is a basic aspect of the dut of government to follow a fair process of decision making when it acts to deprive a person of his possessions . . . The requirement of notice and opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions, (or his amenability to suit). But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the state must listen to what he has to say, substantively unfair and simply mistaken deprivations of property can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.'"

> tive test of the extent of the nonresident's contacts in the state] upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[9]

The resultant standard for determining a nonresident's amenability to the jurisdiction of the state courts is not whether the nonresident is "present" in the state,[10] but rather whether the nonresident has such contacts with the "state of the forum as makes it *reasonable* in the context of our federal system of government, to require the (nonresident)to defend the particular suit which is brought." [11] [Emphasis added.] This reasonableness standard, incorporating the requirements of fair play and substantial justice looks to the quality and nature of the nonresident's contacts with the forum state. Therefore, the central concern of the inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation; to each other.[12]

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[9] *International Shoe, supra* note 5, at 319.

[10] This was the initial standard announced in *Pennoyer, supra* note 2.

[11] *International Shoe, supra* note 5, at 317.

[12] *Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977); see also *Kulko Superior Court of California,* 436 U.S. 84 (1978). In *Kulko,* the Supreme Court succinctly stated the test as "a sufficient connection between the defendant and the forum state as to make it fair to require defense of the action in the forum." at 91.

Decision of the Supreme Court of the State of Utah

To determine the validity of the jurisdiction of the Utah courts, the facts of the present case must be analyzed under this "minimum contacts" standard.[13] Valad is a corporation organized and existing under the laws of the State of New York. While its general offices and production plant are located in the State of New York, Valad employs representatives in other states and supplies merchandise to buyers outside the State of New York. Valad has no offices in the State of Utah, owns no property here, and employs no representatives in the State. Valad contends it did not solicit business in Utah, advertise in Utah, or circulate catalogs or other sales material in the state. However, it did engage in negotiations with Brown, a Utah corporation with its principal place of business in Utah, commencing on April 18, 1972, and resulting in an agreement to manufacture for Brown and supply to Mallory, a Utah corporation, at is principal place of business in Salt Lake City, Utah, certain specific heating units. The heating units were required by Brown and Mallory and certified by Valad to meet specified requirements which involved modifications by Valad of its basic catalog models.

By contracting to supply goods in the State of Utah, Valad falls within the purview of §78-27-23. By its modification of general heating models and their shipment to Utah in fulfillment of this contract, Valad has "purposely avail(ed) itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[14] Thus, Valad's conduct in relation

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[13] As was said in *Foreign Study League* v. *Holland-America Lines* 27 Utah 2d 442, 443, 497 P.2d 244, 245 (1972), "cases of this nature are strictly factual and are disposed of by the application of case and statutory law to the fact situation presented."

[14] *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958).

to the state establishes the requisite minimum factual nexus required by the statute and the applicable case law.[15]

This renders Valad amenable to suit in Utah if the quality and nature of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in this state.[16] As previously stated, this determination depends on the relationship between the defendant, the forum, and the litigation, Reduced to more practical terms, the remaining inquiry involved in ascertaining the restrictions presented by the requirements of fair play and substantial justice concerns; (1) Whether the cause of action arises out of or has a substantial connection with the activity; and (2) The balancing of the convenience of the

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[15] The factual nexus element of the minimum contact standard is related to the concept of notice of the application of the laws of a particular state to the activities of the non-resident defendant. As expressed by Justice Stevens in his concurring opinion in *Shaffer, supra* note 12, at 218: "The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. . . . My contact with the state, though minimal, gives rise to predictable risks (that the state will exercise its power over my property or my person)." The minimum boundary of this factual nexus requirement was established in *Hanson*, id. There, in restricting the broad interpretation given the *International Shoe* decision in *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957), the Court explained: "It is essential, in each case, that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." See *Pellegrini* v. *Sachs and Sons*, Utah, 522 P.2d 704 (1974).

[16] *Kulko* v. *Superior Court of California, supra* note 12, at 91.

parties and the interests of the State in assuming jurisdiction.[17]

Since the present cause of action arose directly out of and is substantially connected to Valad's manufacture of the specific heating units to be supplied to Mallory in the State of Utah, the requisite connection between the non-resident defendant's activity and the cause of action is present. Therefore, the determination of the amenability of the non-resident Valad hinges on the balancing of the inconvenience[18] to Valad of defending the action in the Utah courts and the interests of the state in assuming jurisdiction.

This Court recognizes that any litigation undertaken in a foreign jurisdiction results in some inconvenience to the non-resident defendant. The fact that Valad had no general offices or operations in the State and scheduled no representation in the State, substantiate its assertions of inconvenience. However, the inconvenience to the non-resident must be viewed in relation to the importance of the conflict litigated, which, in a commercial setting, is evidenced by the amount in controversy. If the amount is

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[17] See *Cornelison* v. *Chaney*, 13 C.3d 143, 545 P.2d 264 (1976). The third aspect of the relationship, i.e., the character of the defendant's activity within the state, incorporates the purposeful activity test of *Hanson, supra* note 14. Since this will be fulfilled, whenever the activity is found to fall within the second category of §78-27-24, i.e., contracting to supply services or goods in the state, the crucial inquiry and our attention in the present case is directed at the connection between the activity and cause of action, and the interests of the parties.

[18] While the considerations relevant to a forum non conveniens determination are applicable to this question of convenience, they are not dispositive. See *Hanson, supra* note 14, at 254.

trivial in comparison to the expense of litigating in the foreign forum and the possibility of the defendant defaulting reaches sufficient proportions, the demands of fair play and substantial justice dictates the reservation of the state's jurisdictional power.[19] The substantial quantity of the plaintiff's claims and the resultant size of the judgment when viewed in relation to Valad's annual business mitigate these concerns of inconvenience in the present case.

The character of Valad's business, manufacture of heaters for sale in several states, also influences our determination of its inconvenience in litigating away from its general headquarters. In undertaking interstate business, Valad must recognize and accommodate within its operations the probability and necessity of litigating in foreign forums. While the operation of an interstate business enterprise alone cannot justify personal jurisdiction over a non-resident defendant, the nature of Valad's conduct, i.e., manufacture of products for interstate distribution, justifies placing upon it certain burdens connected with litigating in a foreign forum.

Balanced against the above considerations is the express interest the State of Utah has in ensuring protection to its residents from the unlawful acts of non-residents. The legislative mandate is clear:

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[19] This is mandated by the due process requirement of an opportunity to be heard. Justice Wilkens presented this consideration in his concurring opinion in *Dahnken, Inc. of Cottonwood* v. *Marshinsky*, Utah, 580 P.2d 596, 598-599 (1978); "The inconvenience and expense to defendant—in the context of this case—'. . . reache[s] sufficient proportions, especially when the plaintiff's claim is relatively small, that the defendant [may well] be financially compelled to default.'" (Quoting from Strachan, *In Personam Jurisdiction in Utah, supra* note 4, at 259.)

> It is declared . . . that the public interest demands the same provide its citizens with an effective means of recourse against non-resident persons, who . . . incur obligations to citizens entitled to the State's protection.[20]

Balancing the importance of this interest in relation to commercial transactions involving the supply of goods into the state by a non-resident manufacturer, and the relatively minor degree of inconvenience required to defend this action in Utah, we hold the district court's extension of jurisdiction over Valad to be reasonable. Therefore, the district court's jurisdiction over Valad did not abridge the due process clause of the Fourteenth Amendment, and was a valid exercise of jurisdictional power.

Mallory contends Valad entered a general appearance and thus brought itself within the jurisdiction of Utah courts. Rule 12(b) of the Utah Rules of Civil Procedure provides:

> No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection.

The adoption of this rule has abolished the distinction between general and special appearances in Utah.[21]

Concerning Brown's allegation that he was merely a "conduit" of Mallory, there is sufficient evidence to sub-

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[20] §78-27-22.

[21] See *Ted R. Brown and Associates, Inc.* v. *Carnes Corp.*, Utah, 547 P.2d 206, 207 (1976).

stantiate the district court's finding that Brown's relationship to Mallory was that of vendor to vendee. As to the remaining issues presented on appeal, the facts substantiate the district court's findings of fact and conclusions of law.

WE CONCUR:

D. FRANK WILKINS, *Justice*

I. DANIEL STEWART, *Justice*

HALL, *Justice*: (Concurring and Dissenting)

I concur in affirming the judgment as against Brown. However, I am unable to distinguish the facts of this case as they pertain to the issue of jurisdiction over Valad from those in the case of *Burt Drilling, Inc.* v. *Portadrill,* Utah, —— P.2d —— (No. 15709, filed March 4, 1980). Consequently, and in accord with my dissent therein, I am constrained to dissent from the affirmance of the judgment against Valad.

Crockett, Chief Justice, concurs in the views expressed in the concurring and dissenting opinion of Justice Hall.

Order Denying Motion for Rehearing

SUPREME COURT OF UTAH
STATE OF UTAH
Salt Lake City, Utah

July 10, 1980

Office of the Clerk
ROBERT B. SYKES
Attorney at Law
261 East 300 South, Suite 210
Salt Lake City, Utah 84111

Mallory Engineering, Inc., Plaintiff and Respondent, v. Ted R. Brown & Associates, Inc., Defendant, Cross Claimant and Respondent, and Valad Electric Heating Corp., Defendant and Appellant. No. 15530.

This day petition for rehearing denied.

GEOFFREY J. BUTLER, Clerk

cc: William J. Cayias, Esq.
Allen H. Tibbals, Esq.

Complaint

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
STATE OF UTAH

Civil No. 214595

MALLORY ENGINEERING, INC.,
Plaintiff,

vs.

TED R. BROWN & ASSOCIATES, INC. and VALAD ELECTRIC HEATING CORPORATION,
Defendants.

Plaintiff complains of defendants and for causes of of action against said defendants alleges as follows:

FIRST CAUSE OF ACTION

1. That plaintiff is a Utah corporation with its principal place of business in Salt Lake City, Salt Lake County, Utah.

2. That defendant Ted R. Brown & Associates, Inc. is a Utah corporation with its principal place of business in Salt Lake City, Salt Lake County, Utah.

3. That defendant Valad Electric Heating Corporation is a New York Corporation with its principal place of business in Tarrytown, Westchester County, New York.

4. That in the latter part of 1972 and the early part of 1973 plaintiff had various contract commitments to manufacture for and deliver to the United States Government some specially designed environmental units which required as essential component parts in their manufacture various heating units of precise and exacting specifications.

5. That although plaintiff had previously secured similar heating units from other sources, defendant Ted R. Brown & Associates, Inc. represented to plaintiff that it could provide plaintiff with the required heating units and thereupon entered into a written contract with plaintiff to provide plaintiff with the heating units in accordance with prescribed delivery schedules to enable plaintiff to meet its aforesaid government contract commitments.

6. That defendant Ted R. Brown & Associates, Inc. thereupon undertook to provide plaintiff with the heating units by and through defendant Valad Electric Heating Corporation.

7. That although plaintiff did all things required of it under and pursuant to the terms of the contract it had with defendant Ted R. Brown & Associates, Inc., said defendant failed to perform, defaulted on and breached its contract with plaintiff in the following vital and essential particulars: (a) Said defendant failed to provide plaintiff with the heating units timely and in accordance with required and prescribed delivery schedules; (b) Said defendant failed to provide plaintiff with heating units meeting the contract's precise and exacting specifications; (c) Said defendant failed and refused to modify the heating units which it had provided planitiff so that they would meet the contract's precise and exacting specifications; and, (d)

Said defendant failed and refused to provide plaintiff with substitute heating units which would meet the contract's precise and exacting specifications.

8. That as a direct and proximate result of said defendant Ted R. Brown & Associates, Inc. default and breach of contract as aforesaid, plaintiff sustained damages of not less than $15,000.00 because plaintiff was thereby made to default on its contract commitments with the United States Government and forced to secure heating units from another source at considerable additional cost and expense to plaintiff. The total and exact nature of all the damages which plaintiff sustained as a direct and proximate result of said defendant's default and breach of contract as aforesaid is not ascertainable at this time but will be furnished to said defendant prior to the trial of said case and plaintiff hereby reserves the right to modify or amend its complaint by inserting the total of said damages in its complaint prior to the trial of said case.

SECOND CAUSE OF ACTION

9. That as part of its Second Cause of Action plaintiff repleads and incorporates herein by reference all of the allegations set forth above in paragraphs 1 through 8 of its First Cause of Action.

10. That defendant Valad Electric Heating Corporation was the corporation which manufactured the heating units which defendant Ted R. Brown & Associates, Inc. contracted to furnish plaintiff.

11. That after certain heating units had been delivered to plaintiff for installation in the environmental chambers which plaintiff was manufacturing for the United States Government, plaintiff became concerned that the said heating units would not properly perform and would not meet the precise and exacting specifications which were required of such heating units. Plaintiff's concern in this regard was conveyed to both defendant Ted R. Brown and Associates Inc, and to defendant Valad Electric Heating Corporation in response to plaintiff's concern thereupon certified and guaranteed to plaintiff both orally and in writing that the heating units would in fact meet the precise and exacting specifications required and as were prescribed in the contract for said heating units which plaintiff had with defendant Ted R. Brown & Associates, Inc.

12. That in spite of the aforesaid certifications and guarantees made by defendant Valad Electric Heating Corporation, the said heating units which said defendant Valad Electric Heating Corporation manufactured and delivered to plaintiff did not and would not meet the precise and exacting specification required. Furthermore, said defendant Valad Electric Heating Corporation knew and had been informed in advance that said heating units must meet the precise and exacting specifications which plaintiff prescribed.

13. That even after said defendant Valad Electric Heating Corporation was informed that the heating units did not and would not meet the precise and exacting specifications required, said defendant failed and refused to do anything about modifying the said heating units to enable them to meet the exacting specifications or to furnish plain-

tiff with substitute heating units which would meet the exacting specifications.

14. That as a direct and proximate result of said defendant Valad Electric Heating Corporation's failure to deliver heating units to plaintiff which met or would meet the precise and exacting specifications required and which failed to meet the precise and exacting specifications which said defendant Valad Electric Heating Corporation certified and guaranteed to plaintiff would meet those precise and exacting specifications, plaintiff sustained damages of not less than $15,000.00 because plaintiff was thereby made to default on its contract commitments with the United States Government and forced to secure heating units from another source at considerable additional cost and expense to plaintiff. The total and exact nature of all the damages which plaintiff sustained as a direct and proximate result of said defendant's failures, certifications and guarantees as aforesaid is not ascertainable at this time but will be furnished to said defendant prior to the trial of said case and plaintiff hereby reserves the right to modify or amend its complaint prior to the trial of said case.

15. That the manufacture by said defendant Valad Electric Heating Corporation of the heating units which were delivered to plaintiff and the damages which were sustained by plaintiff as a direct and proximate result of the failure of said heating units to meet the precise and exacting specifications required of said heating units in spite of the oral and written certifications and guarantees by said defendant that they would do so, makes said defendant Valad Electric Heating Corporation amenable to and subject to the jurisdiction of the Utah Court under and pursuant to the long arm statute of the State of Utah being

Sections 78-27-22 through 78-27-28 Utah Code Annotated 1953, as amended.

THIRD CAUSE OF ACTION

16. That as part of its Third Cause of Action plaintiff repleads and incorporates herein by reference all of the allegations set forth above in paragraphs 1 through 15 of its First and Second Causes of Action.

17. That both defendants had engineering experts employed by them or associated with them who either knew or reasonably should have been able to ascertain that the heating units which were furnished plaintiff would not meet the precise and exacting specifications which were required by plaintiff for such heating units.

18. That nevertheless both defendants represented to plaintiff that said heating units would meet the required precise and exacting specifications and defendant Valad Electric Heating Corporation actually certified and guaranteed to plaintiff that said heating units would meet the required specifications.

19. That the heating units did not meet the required specifications and each defendant either knew or reasonably should have known that they would not meet the required specifications but nevertheless misrepresented to plaintiff they would meet the required specifications.

20. That plaintiffs relied on the representations of said defendants to their damage in a sum not less than *$15,000.00* because the representations of said defendants

were not true. The total and exact extent of the damages sustained by plaintiff as a direct and proximate result of the misrepresentations of defendants is not ascertainable at this time but will be furnished to said defendants prior to the trial of said case and plaintiff hereby reserves the right to modify or amend its complaint by inserting the total of said damages in its complaint prior to the trial of said case.

21. That because even after plaintiff called defendants' attention to the fact that the heating units would not meet the precise and exacting specifications required of plaintiff, defendant Valad Electric Heating Corporation nevertheless wilfully and deliberately thereafter certified and guaranteed to plaintiff that the said heating units would meet said specifications when in fact they did not and would not, so that plaintiff is entitled to exemplary damages against said defendant Valad Electric Heating Corporation in a sum not less than $25,000.00 in addition to all actual damages which were sustained by plaintiff.

WHEREFORE, plaintiff prays for judgment against said defendants and against each of them as follows:

A. For damages against defendant Ted R. Brown & Associates, Inc. on its First Cause of Action in the sum of not less than $15,000.00 or such other and further sum as may be hereafter inserted in the complaint by amendment and for costs incurred.

B. For damages against defendant Valad Electric Heating Corporation on its Second Cause of Action in the sum of not less than $15,000.00 or such other and further sum as may be hereafter inserted in the complaint by amendment and for costs incurred.

C. For damages against both defendants and against each of them on its Third Cause of Action in a sum not less than $15,000.00 or such other and further sum as may be hereafter inserted in the complaint by amendment; and, for the sum of $25,000.00 exemplary damages against defendant Valad Electric Heating Corporation and for costs incurred.

D. For such other and further relief as may be just and appropriate in the premises.

QUENTIN L. R. ALSTON
Quentin L. R. Alston
Attorney for Plaintiff

Plaintiff's address:

755 North 400 West
Salt Lake City, Utah

Intermediate Order by District Judge Stewart N. Hanson, Jr.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MALLORY ENGINEERING, INC,

Plaintiff,

vs.

TED R. BROWN & ASSOCIATES, INC. and VALAD ELECTRIC HEATING CORPORATION,

Defendants.

ORDER

Civil No. 214595

This matter came on for hearing before the Honorable Stewart M. Hanson, Jr., on the 23rd of April, 1975, on the motion of defendant Valad Electric Heating Corporation to quash service of summons and declare that this Court has no jurisdiction over it. Plaintiff was represented by Quentin L. R. Alston, its attorney of record. Defendant Ted R. Brown & Associates, Inc. was represented by Craig G. Adamson of the firm of Tibbals and Staten. Defendant Valad Electric Heating Corporation was represented by Robert B. Sykes purporting to appear under a special appearance. The matter was argued extensively and submitted, and the Court being fully advised, it is

Intermediate Order by District Judge
Stewart N. Hanson, Jr.

ORDERED:

That defendant Valad Electric Heating Corporation's motion be, and the same is hereby, denied.

DATED this 24th day of April, 1975.

By the Court:

STEWART M. HANSON, JR.
District Judge

Affidavit of Peter Cecchini

IN THE DISTRICT COURT OF SALT LAKE COUNTY, SATE OF UTAH

MALLORY ENGINEERING, INC,

Plaintiff,

vs.

TED R. BROWN & ASSOCIATES, INC. and VALAD ELECTRIC HEATING CORPORATION,

Defendants.

AFFIDAVIT

Civil No. 214595

STATE OF NEW YORK
COUNTY OF WESTCHESTER
VILLAGE OF TARRYTOWN,

PETER CECCHINI, being duly sworn, says:

1) I am General Manager with defendant Valad Electric Heating Corp. (hereafter "Valad"); and I have served in that capacity since 1963.

2) Valad is a corporation organized and existing under and by virtue of the laws of the State of New York. Its'

sole and only general offices and production plant are located at 160 Wildey St., Tarrytown, New York 10591. Its' only former general offices and production plant were located at 71 Courtlandt St., Tarrytown, New York 10591. Said former premises were used by Valad from 1956 to March 1974.

3) From 80 to 90 percent of all sales made by Valid are solicited by me, personally, on behalf of Valid. The other 10 to 20 percent of sales are either solicited or followed up by sales representatives identified and located as follows:

Allied Industries, Los Angeles, Calif., Central/ Southern Calif.;

Safford Assoc., Houston, Texas, Gulf Coast area of Texas;

Technical Marketing, Gulfport, Miss., Gulf Coat area of Louisiana, Mississippi & Alabama;

Sparks & Co., Bethesda, Maryland, Phila., Pa. area to Norfolk, Va. areas including, Maryland, Delaware, Washington, D.C.;

Coast Products Inc., Seattle, Wash., Washington, Oregon, Alaska;

John Deabler Inc., Waukesha, Wisc., Northeast area of Wisconsin.

4) The foregoing representatives were used by Valad on the Years 1974-1975. Prior to 1974, Valad had only two representatives outside the State of New York; namely, Technical Marketing Inc. and Safford Associates Inc,

5) Valad never had any sales or other representative in the State of Utah at any time, nor did it ever have any agent or employee located in or even visiting Utah. In

other words, Valad never had solicited, employed, authorized, or sent any representative in or to Utah for any purpose.

6) Valad specializes in the manufacture of electric heaters; but prior to the sale involved in the complaint herein, Valad had never sold any of its' units in Utah or for use in Utah. Its' only employees and agents were at all times employed in New York State.

7) Valad never received from anyone in Utah any payment for any of its heaters. Neither of the other parties to this litigations has paid for the revelant units they ordered; except the amount of $1262.00.

8) Valads' gross sales for its' fiscal year from March 1973 to March 1974 amounted to roughly $350,000.00. The sale involved in the complaint herein was quoted to T. R. Brown and Associates (hereafter "Brown") at $5,649.05. The $1262.00 being less than one-half of one percent of Valads' gross ales.

9) Valad never maintained and does not now maintain any bank accounts or other financial interests in Utah. All its bank accounts were and are invariably located only in Tarrytown, New York.

10) Valad does not own and has never owned real or personal property in Utah; nor did it ever have any claim or chose-in-action pertaining to property or persons in Utah.

11) Valad does not, and never did, solicit business in Utah. It never advertised in Utah; never maintained a

phone listing in Utah; and never circulated it catalogs or other sales material in Utah.

12) The first contact of Valad with any other party to this litigation came from Mr. Nyman, Browns' agent. He phoned me for the first time on 4-18-72. His discussion with me probed the possibility of ordering some of our heater assemblies. All subsequent conversations regarding sale of such assemblies were initiated by Brown through its agent, Nyman. I cannot remember any exception to this statement.

13) All of our sales contracts are by express stipulations in our sales documents consummated on the basis of Tarrytown, N.Y. This was equally true of all Valad units shipped to Plaintiff herein (hereinafter sometimes "Mallory"). Also, in the instant case, the acceptance of Mallorys' offer by Valad took place in New York.

14) As we have pointed out in our answers to Browns' and Mallorys' Interrogatories, all negotiations regarding the relevant sale of Valads' heaters and assemblies took place between Brown and Valad, usually by phone conversations between Nyman and me; and I invariably confirmed such conversations between Nyman and me; and I invariably confirmed such conversations by letter and noted them in memoranda regularly made by me in the regular course of business. Such regular records I personally prepare and keep in respect to all Valad customers with whom I deal. I invariably make and retain memoranda of all business telephone calls, whether incoming or outgoing.

15) In summary, Valad has not transacted or conducted business activities in the State of Utah, which neither I

nor other officers or employees of Valad have ever had occasion to visit.

16) It is extremely burdensome and impractical for Valad and for me and other officers of Valad to be forced to defend this law suit in the State of Utah, especially because Valads' records, models, drawings, testing apparatus, experts, and personnel are located in Tarrytown, New York; and because, I as a principal witness for Valad, am preoccupied with my heavy work schedule here as General Manager. Such work is essential to the survival of Valads' business.

17) Finally, I wish to state most emphatically that at no time did Valad or I for Valad, or anyone else waive the affirmative defense in our answer of no jurisdiction under the Utah "long-arm" statute. Having interposed that defense in the answer, which in no respect is a transitory or merely temporary document, or one which has only a temporally limited effectiveness, we at Valad at all times assumed that it survived the date of the answer and set the tone for Valads' position in this respect. The fact that we responded to Browns' and Mallorys' Interrogatories cannot be construed as a waiver of this affirmative defense. This is true whether one considers the text of the Interrogatories, of our responses to those Interrogatories or common-sense fairness in the involved procedures. Had we failed to answer the Interrogatories, in the circumstances, we feared we might prejudice our case by seeming to indicate that we fear to tell the truth.

We knew that ultimately we would have to retain an attorney in Utah; and we always counted on him to move eventually on the question of jurisdiction under that "long-

arm" statute, especially since our attorney in New York told us that such jurisdiction could conceivably raise constitutional questions under the Fourteenth Amendment to the United States Constitution.

PETER CECCHINI
Peter Cecchini, General Manager
Valad Electric Heating Corp.

Sworn to before me this
19th day of April 1975

Abraham H. Kaplan
NOTARY PUBLIC,
State of New York
No. 60-2030210
Qualified in Westchester County
Term Expires March 30, 1977

Amended Judgment

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MALLORY ENGINEERING, INC,
Plaintiff,

vs.

TED R. BROWN & ASSOCIATES, INC. and VALAD ELECTRIC HEATING CORPORATION,
Defendants.

Civil No. 214595

The above-entitled matter having come on regularly for non-jury trial before the above-entitled Court, the Honorable G. Hal Taylor, District Court Judge, presiding on January 21, 1976 and trial having continued from day to day and being finally concluded on Wednesday, January 28, 1976, and the Court having heard arguments of counsel with respect to the matter and now having entered it Findings of Fact and Conclusions of Law, and being advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That plaintiff be and is granted judgment against Ted R. Brown and Associates, Inc., in the total sum of

$41,488.40, with the same to accrue interest at the rate of eight per cent (8%) per annum until paid. That plaintiff is also granted judgment against Brown for Mallory's costs herein in the sum of $66.50.

2. That Ted R. Brown and Associates, Inc. is awarded judgment against Valad Electric Heating Corporation for the total sum of $45,231.55 and the same to accrue interest at the rate of eight per cent (8%) per annum until paid.

3. That plaintiff Mallory Engineering, Inc., be and is granted judgment against Valad Electric Heating Corporation in the sum of $41,488.40 and said amount to accrue interest at the rate of eight per cent (8%) per annum until paid. That plaintiff is also granted judgment for its costs in the amount of $66.50.

4. That the Counterclaim and Cross-Complaint of defendant Valad Electric Heating Corporation be and is dismissed upon its merits.

5. That the issues raised by the Amended Counterclaim of defendant Ted R. Brown & Associates, Inc., against Mallory shall be heard and determined in a separate and future proceeding between plaintiff Mallory Engineering, Inc., and Ted R. Brown & Associates, Inc.

6. That in view of additional proceedings between the plaintiff, Mallory, and the defendant, Brown, it is Ordered that any supersedeas bond on the total judgement granted to Mallory against Brown may be reduced by $18,000.00 and shall be in effect until the Amended Counterclaim is heard and determined by the Court on its merits.

Amended Judgment

7. Plaintiff, Mallory, shall be limited to a total recovery on the judgements granted against Brown and Valad of $41,488.44 together with costs of $66.50 and interest at Eight per cent (8%) per annum from the date of this judgement until date paid. In the event that Mallory shall elect to proceed to collect on the judgement awarded herein against Brown, Brown shall be entitled to offset against the amount of said judgement, any sum which may be determined to be due from Mallory to Brown in the trial of the remaining issue between said parties before this Court and in the event the Mallory shall elect to proceed to attempt collection of its judgement against Brown prior to the determination of the
parties, then Brown is hereby granted a stay of execution against Mallory in the sum of $18,000.00 until the resolution of the remaining issues between said parties, and said stay is granted without Brown being required to post bond therefore.

8. Brown shall be entitled to recover on its judgement, granted herein against Valad, the sum which Brown may have paid plaintiff or which plaintiff may have recovered from Brown in satisfaction of the judgement awarded to the plaintiff herein, together with interest at Eight per cent (8%) per annum from the date of payment by or recovery from Brown of any sum applicable to the judgement granted the plaintiff herein, to date of payment by Valad, plus the sum of $3,843.15 together with interest at Eight per cent (8%) per annum from the date hereof to date of payment.

Dated this day of , 1977.

Judge

Amended Judgment

MAILING CERTIFICATE

This is to certify that a true and correct copy of the foregoing Amended Judgement was mailed, postage prepaid, to Robert B. Sykes, Attorney for Defendant, Valad Electric Heating Corporation, 320 South Third East, P. O. Box 1783, Salt Lake City, Utah 84110, and to Quentin L. R. Alston and William J. Cayias, Attorneys for Plaintiff, 1558 South 1100 East, Salt Lake City, Utah 84105, this 16th day of August, 1977.

Illegible

Speed Letter dated January 26, 1973

To Valad Electric Heating

From Ted R. Brown and Associates
P.O. Box 1356
1401 Major Street
Salt Lake City, Utah 84105

Subject 2-12 Kw Defrost Heaters, P.O. 6754

Date 1/26 1973

MESSAGE

These heaters, shown on dwg. 73-117, seem OK as shown with the following exceptions: Heaters must be turned 90° so long side of oval is parallel to length of mounting flange. High limit thermostat must be installed, and penetration of flange must be for Class I, Group D inside duct. Mounting holes drilled in periphery of flange not to be used, unless advised later to use them. Please advise delivery.

Thanks.

CARL NYMAN

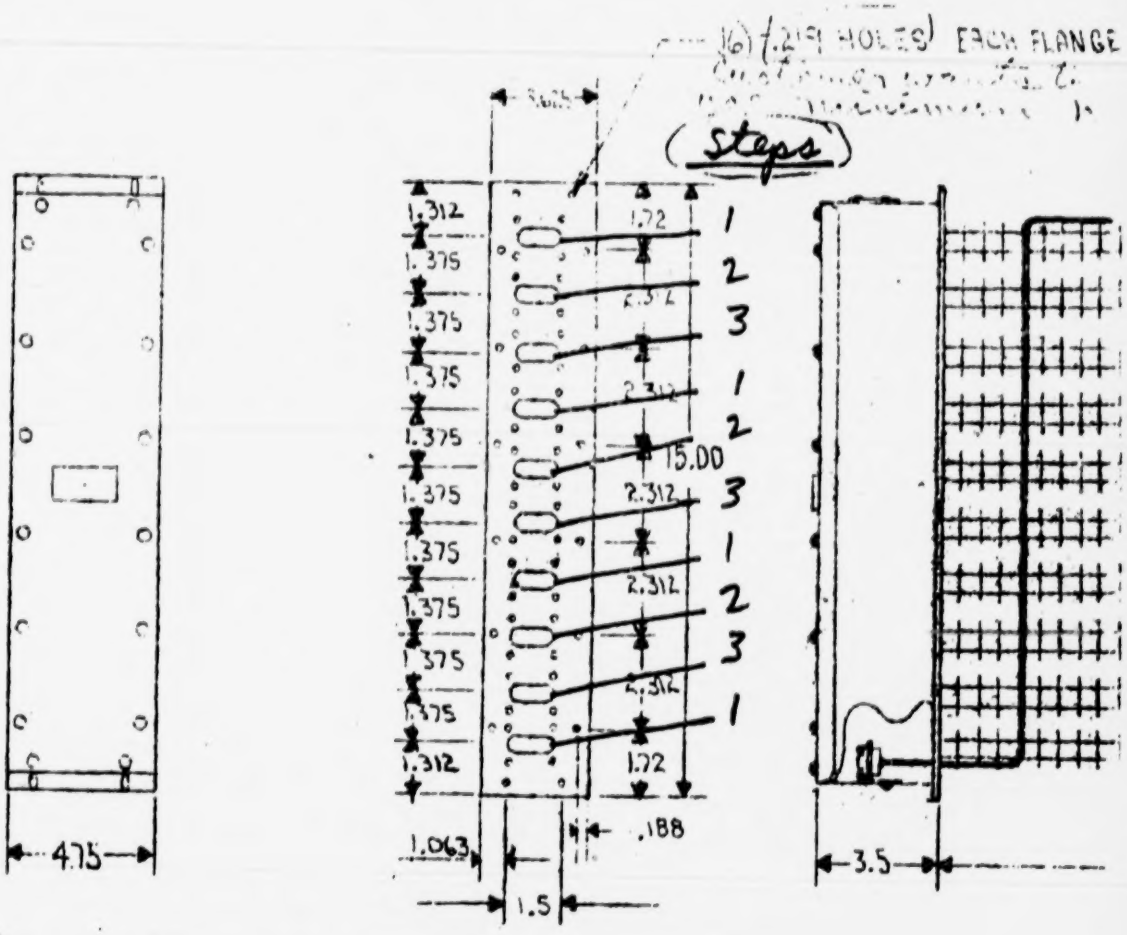
Exhibit 83

Drawing No. 73-119

(Opposite) ☛

37a

letter to Malory stating C for Class I, Group D usage must accompany shipment, plan purchase order.



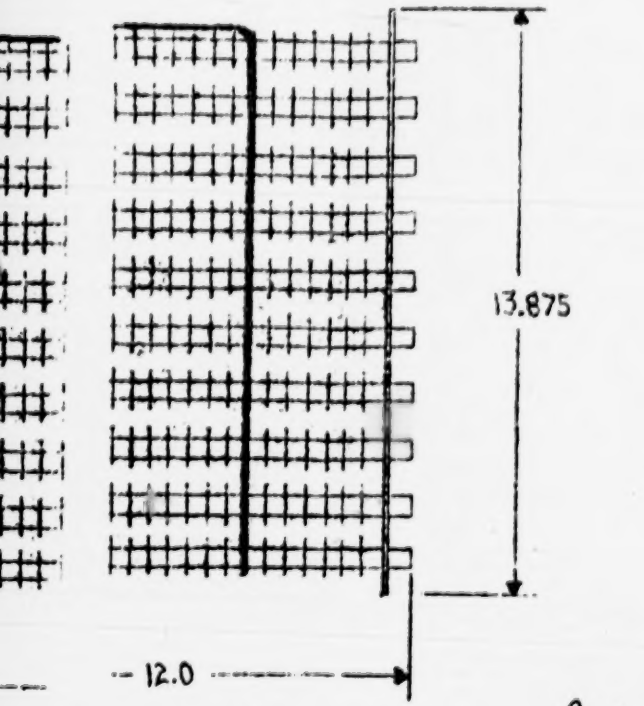
Terminal box opening ... cover drawing to indicate flg. on sheet ... to indicate flg. to outside edge of inner step of cutout

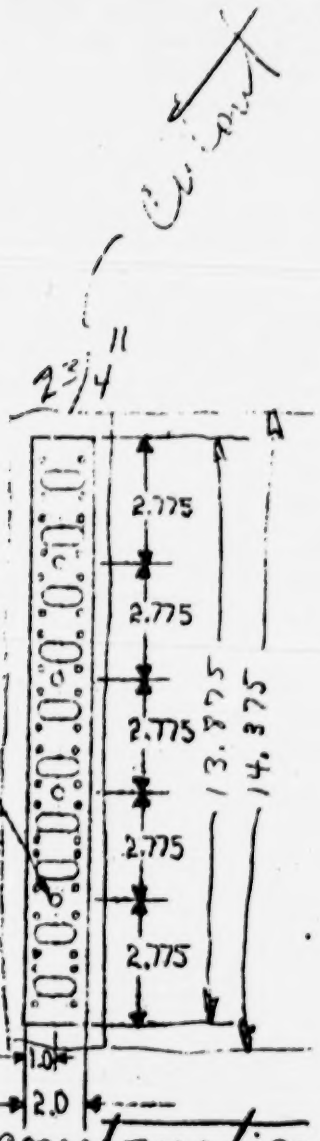
S/B 3 tstats per insert, due to 3 steps.
9 Total on 3 inserts, per 12/22 letter.
250°F max sheath temp

(45)

ANGE

HTE, 3 PLATES PER FRAME





Approved for construction, subject to comments as made.
Earl Nyman

REVISIONS			VALAD ELECTRIC HEATING CORP TARRYTOWN NY 10591		
NO	DATE	BY	INSERT DUCT HEATER 208 VOLTS 7 EA KW 3 PH		
1					
2					
3			DRAWN BY DC	SCALE N.T.S	MATERIAL SS
4			CHK'D	DATE 1-73	DRAWING NO 73-119
5			TRACED	APP'D	

Ed. 83

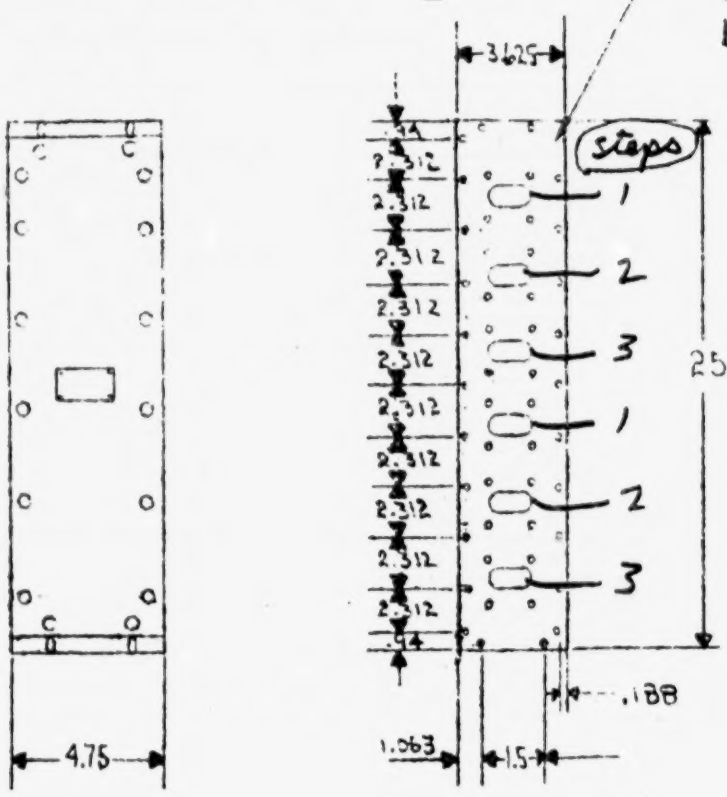
Exhibit 83 Continued

Drawing No. 73-120

(Opposite) ☛

Letter to Mallory stating Ck. for Class I, Group D usage must accompany shipment, per purchase order

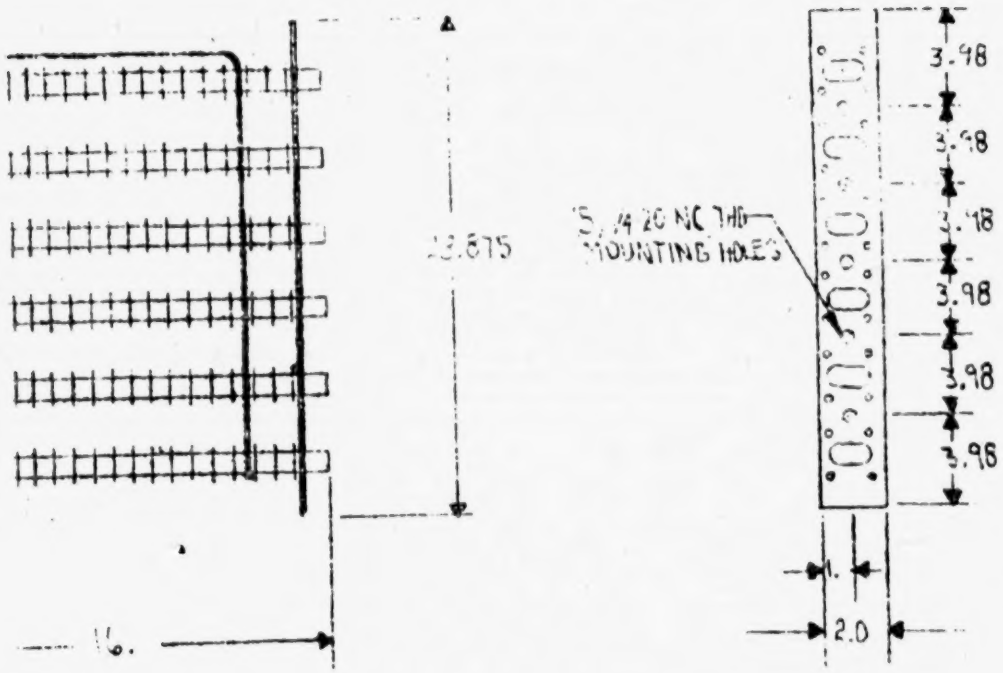
T.R. BROWN, J.O. #2164, 15kw



3 thermostats each insert, to limit to 2 sheath temps, since have 3 steps.

(45)

SE PLATE 3 PLATES PER [illegible]
cut these holes for mtg.
these for attaching terminal
& number & seal.



F

Approved for construction,
subject to comments as made
Carl Nyman

REVISIONS			VALCO DIECTRIC HEATING CORP
NO	DATE	BY	TARRYTOWN NY 10591
1			INSERT DUCT HEATER
2			208VOLTS 5EA KW 1 F
3			DRAWN BY [illegible] SCALE N.T.S MATERIAL SS
4			CHK'D DATE 1/22 DRAWING NO 73-12[illegible]
5			TRACED APP'D

Feb. 83 (Cont'd)

Excerpts from Transcript

(615)* Mr. Schmidt: I move, Your Honor, that both the complaint and the cross-complaint against Valad be dismissed. And does Your Honor want me to go into the reasons why I am making the motion, or it is a matter you feel you are familiar with? I'd like to be able to state some of the reasons.

The Court: Well, I suppose you ought to state your reasons to some extent.

Mr. Schmidt: Number one, it is quite obvious that from the testimony in the record here, a purchase order is not a contract. And my client received a number of purchase orders. And it not only did not accept them, but did not even acknowledge their receipt. But my client took the position that if a purchase order is an offer, it did not accept it.

And there followed after the receipt of a purchase order, of the purchase order, a number of communications by telephone usually, and a transmission of sketches, and that resulted in a certain type of clarification. And after that period of clarification my client prepared, within shorter or longer lengths of time, a counter offer in the form of a drawing for construction of the apparaus needed.

And we presented that for approval. Obviously Brown, to whom we presented it, and Mallory to whom we also presented it, but our customer was Brown. And there is nothing in the record to dispute the fact that the only relationship between Mallory and Brown was that of purchaser and seller. And there is nothing in the record to dispute the fact that as between Brown and Valad the relationship was purely one of purchase and seller.

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* Numbers in parenthesis refer to pages of Trial Transcript.

Excerpts from Transcript

My clients, as I say, submitted that order to Brown and to Mallory. And in time Mallory accepted that (616) offer in the form of a drawing and said, "Approved for construction." Now, my client was the more disposed to do that, not because it was the whim of the moment or because something happened just in this case that was unique, my client had the habit of dividing its work methods into three parts that has been testified to.

The Court: Let me ask you a question right there. Do you take the position that the purchase order, once that drawing was made, had nothing to do with the contract?

Mr. Schmidt: No. I don't say it had nothing to do with the contract. But I say this, that the drawing translated the purchase order into the practicality of construction. And this was not something that my client designed.

As a matter of fact that Mallory Interrogatories say in so many words three times in the first Interrogatory—answer to the first Interrogatory, that the purchase orders submitted all of the parameters of design and manufacture needed for the construction of the thing. Now, my client made an interpretation of those drawings in accordance with its knowledge and in accordance with its accumulated experience.

I know that the—in the first place there are discrepances between the Brown order and the Mallory purchase order, between the Brown purchase order and Exhibit 4.

The Court: Well, are you arguing to me that Mallory got what they contracted to buy?

Mr. Schmidt: Yes, I am arguing that, because they approved this. And we gave them exactly what the drawing states. And if they did not think—or if they thought there was some question about it—let me say this, Your Honor. (617) Let me interrupt myself to say this. Never, at any time before the trouble developed, was there any

statement by either Brown or Mallory that it was an end result they wanted.

And had they really wanted an end result, they would have done it very differently. They would have said they don't care how you manufacture it. This is the end result. That's the way we do it with Class C cases. They come to us and say, "Here is and end result. That's all we want. Build a prototype and experiment with it and then come up with that end result."

And they have to pay for the designing. They have to pay for the modifications and so forth. In this case they were buying something from us for which we gave the specifications of our construction in a drawing. And we gave one additional fact in addition. And that is we gave the constant 3.07, from which they could easily, and Mr. Nyman admitted it on the stand today, too, compute the density. And I say that's all that was necessary.

Now, there I am talking about our relationship with Brown, because of our relationship with Mallory only came after trouble brewed. We never dealt directly with them except to send a few drawings at the same time to both Mallory and Brown. Now I go to the cross-complaint. And incidentally, even before I come to the cross-complaint, the complaint states that in Paragraph 5, that there was a written contract between Mallory and Brown to provide plaintiff with heating units in accordance with its Government commitments.

If they were so interested in having a result in conformity with Government specifications—

The Court: They didn't proffer it was in conformity (618) with Government specifications. And it's clear you never got those. So you don't need to argue that.

Mr. Schmidt: So if they were interested in the end result obviously the Government wanted, they would have

given that to both Brown and Valad. And I say there is no jott or tiddle of proof before Your Honor that there was such a contract between Mallory and Brown. As I see it there is just a purchase order.

The Court: The evidence was clear that nobody got from Mallory the Government specifications. And while the complaint may have suggested that they did, now at the conclusion of the evidence, they didn't prove it and whether that might have been a better method on the part of Mallory, I don't think you are suggesting that that would be the only method.

Mr. Schmidt: I am not suggesting it's the only method, but it happens to be the method they have adopted here and it is a deficient method in view of the manner in which Mallory—I mean Valad conducted its business.

Now, the reason for—I believe Brown cited a whole question of third party beneficiary. And they cited the Kadiak case. And I must say, as cases go, it's closer to this situation than most cases that you have when you are faced with a problem. But there are many differentiating circumstances. And I will go into some of them.

But I want to say that the whole problem of third party beneficiary apparently is different in the State of Washington from where this Kadiak case hails as from the State of Utah. And I put in evidence—it's the only evidence on the subject, some testimony to the effect that (619) there was no donee-beneficiary relationship.

There was no creditor-beneficiary relationship. And in any case it has always been held in this line of cases that there must be strong evidence in favor of the intent to create the third party beneficiary status. And I say that that is completely lacking here.

Now, the only writing in the picture is our certification. And I maintain, number one, that we complied with our

certification. But, number two, that that certification came after the acceptance of the drawings according to which we were to construct.

And they didn't say, "It mistakably—" They said, "It is unmistakably approved for construction." Now, so far as testings are concerned, they certainly couldn't have expected us to make the tests in location, because we were pretty far away from Salt Lake City.

And we did not—we were never asked to come out there, as they asked Regan to come here into the Mallory plant. And it's an altogether different situation when you do that. And it's more suggestive of an end result when they do it that way. But they didn't even give us the density requirements they wanted in the documents that they called purchase orders.

And I say, the purchase orders were never accepted as such. What was accepted was our construction drawing. It was approved for construction and therefore I fail to to see any contract in this picture between my client and Brown. And there is certainly no contract between my client and Mallory which my client has violated.

The Court: Well, in the course of this trial, and (620) I suppose it eased my burden somewhat, I didn't have to rule on the question of parol evidence. We were very liberal. Counsel apparently was willing to have anybody that wanted to explain the various writings do so. And to the extent that it has been explained to me, it saved a lot of my time.

Now, it's easier than stopping the trial and reading it. I think it was helpful. But there is some of the documents which, in the mind of the Court, are not subject to interpretation. While I am not going to make the complete decision on this, I am going to deny your motion to dismiss, and for this reason.

Mallory didn't get what they thought they were going in his interpretation of the certificates of certification, and to get. Whether the method that they adopted was proper or no, I don't know. Your Production Manager particularly the words "when operating at continuous full voltage," did not preclude the installation of thermostats in there to—which the evidence is clear the thermostats that were in those heaters, and there isn't any controversy as far as I can see, were put in there in such a manner that there was going to be an interrupted flow of current and not continuous.

And the one ruling I am willing to make now, and the Court is convinced that by the preponderance of the evidence of all of the witnesses, that Valad was required, by all the evidence involved, to furnish a heater which would operate at continuous full voltage with a five foot per second air velocity and a maximum air temperature of plus 160 degrees Fahreneit, which they did not do. Any other motions?

Mr. Tibbals: Yes, Your Honor. At this time I would

* * *

(628) of the manufacturer in designing and manufacturing the underground heating system, and in supplying faulty instructions to the contractors, Navarre Heating & Plumbing Company.

The two theories will be discussed separately to demonstrate why it is our view that the appellant is entitled to have his case decided by a jury on the merits and why he should not be turned out of court as a matter of law on the theory that there was no privity of contract between appellant and the manufacturer."

And the Court then proposed to hold that there was privity between the two, "Since Navarre Plumbing & Heat-

ing Company was entirely subject to the appellant's control in its choice of insulated pipe (namely Ric-Wil products), and did not exercise any independent judgment, it acted in the capacity of an agent, and the contract was between the appellant and the respondent. Thus, all of the warranties, if they were in fact given and relied upon, were given to the appellant."

Now, in our own State we have had—

The Court: Mr. Tibbals, I think we have reached the end of the day. Mr. Alston, of course, is going to want to discuss this. As I see it, the two defendants would like to point the finger and say, "It's not me. It's him." And the only thing I have concluded, and I might say this, Mr. Schmidt, in denying your motion to dismiss, I did not intend in any way to rule on the question of liability.

Mr. Schmidt: Oh. I am very happy to hear that.

The Court: I am just going to give you an opportunity to sit through the damages, and then I will make my final decision.

* * *

(631) January 28, 1976 10:00 A.M.

PROCEEDINGS

The Court: In order that the record might be clear in this matter with regard to where we are, the record may show that counsel had a conference with the Court in Chambers, all of them being present, and reviewed the question of the bifurcation of this matter as being liability and damages. At the outset I think all counsel agreed, and the Coutr ruled that there would be a bifurcation between liability and damages.

Excerpts from Transcript

At the conclusion of the plaintiff's testimony, Mr. Alston, as I recall, we didn't take this up in Chambers, as I recall now, was somewhat concerned whether he should go forward or whether he was reserving the right entirely to put his damages on separately. And I think I ruled at that time that yes, we would get through with liability and stated in effect that once I had ruled on liability we would go forward with damages.

I suppose at that point in time I was of the opinion that perhaps I might be able to rule absolutely on liability, either dismiss or hold one or the other or both of the defendants either liable or not liable.

At the conclusion of all the evidence, and upon the motions being made, I did then and I now express the opinion that I am somewhat in doubt and have indicated to counsel that in order that I might make a proper decision in this matter, or at least feel comfortable with that, I was going to request briefs. As between the plaintiff and the defendant Valad, I indicated in Chambers that I felt that the burden of persuasion in view of my rulings, would be upon (632) Valad to persuade me that they were not liable.

Now, that is substantially what we took up in Chambers?

Mr. Schmidt: Yes, Your Honor, very accurately.

Mr. Alston: I think it is, Your Honor.

Mr. Tibbals: It's very accurate, Your Honor.

The Court: Now, one further thing, and I suppose as between the defendant—or as between the defendants, I am uncertain where the burden of persuasion lies. I think you may want to exchange briefs on it, and I suppose Mr. Alston will want an opportunity to answer the briefs, well both of them for that matter.

I suppose the purpose, really, and I am sufficiently in doubt as to Mr. Tibbals' client, Brown's position, that I

think probably the burden of persuasion would be on the plaintiffs to persuade me that they were something more than an intermediary, and probably simultaneously the briefs can be prepared on that issue. And then Mr. Alston and Mr. Schmidt can submit their briefs and exchange them with counsel and give a reasonable time thereafter to reply, if necessary, and hopefully I can make a proper decision.

• • •

Notice of Appeal

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Civil No. 214595

Supreme Court No. 15530

MALLORY ENGINEERING, INC.,

Plaintiff and Defendant,

vs.

TED R. BROWN & ASSOCIATES, INC.,

Defendant, Crossclaimant, Respondent, Defendant to Valad's Counterclaim and Appellant,

and

VALAD ELECTRIC HEATING CORP.,

Defendant, Cross-Defendant, Counterclaimant and Appellant.

NOTICE IS HEREBY GIVEN that Valad Electric Heating Corporation, Defendant, Cross-Defendant, Counterclaimant and Appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of the

Notice of Appeal

Supreme Court of the State of Utah entered herein March 6, 1980, the rehearing on which was denied by order of this court entered on July 10, 1980.

This appeal is taken pursuant to 28 USC Sec. 1257(2).

Dated this 7th day of October, 1980.

ROBERT B. SYKES
Attorney for Defendant, Valad
Electric Heating Corporation

Findings of Fact and Conclusions of Law of the District Court of the State of Utah

QUENTIN L. R. ALSTON *and*
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Telephones: 467-5100/467-5109

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

Civil No. 214595

MALLORY ENGINEERING, INC.,
Plaintiff,

—vs.—

TED R. BROWN & ASSOCIATES, INC.,

and

VALAD ELECTRIC HEATING CORP.,
Defendants.

The above matter came on regularly for non-jury trial before the above Court with the Honorable G. Hal Taylor, District Judge, presiding. The trial commenced Wednes-

day, January 21, 1976, continued from day to day on regular week days thereafter and finally concluded on Wednesday, January 28, 1976.

Plaintiff Mallory Engineering, Inc. (hereinafter Mallory) was represented by its attorney, Quentin L. R. Alston; Defendant Ted R. Brown & Associates, Inc. (hereinafter Brown) was represented by its attorney, Allen H. Tibbals; and, Defendant Valid Electric Heating Corporation (hereinafter Valad) was represented by its attorney Godfrey P. Schmidt and Robert B. Sykes.

Witnesses were called, testimony adduced and evidence received in support of the positions of each of the parties. During the trial and in order to do complete justice and equity in the matter, the Court in its discretion granted Defendant Brown's Motion to file an Amended Counter-Claim against Plaintiff which did not involve Defendant Valad and would not require the attendance of Defendant Valad at the trial of the issues raised by the Amended Counter-Claim. Since the Amended Counter-Claim related only to issues between Plaintiff Mallory and Defendant Brown, the trial was fifurcated so as not to delay the Court in making a determination of the principal issues involved in the litigation and permit Plaintiff to reply to the Amended Counter-Claim and also permit both Plaintiff and Defendant Brown to make discovery and take other procedures with reference to the issues raised by the Amended Counter-Claim as authorized by the Utah Rules of Civil Procedure.

After all parties had rested, the matter was argued orally to the Court. At the conclusion of the oral arguments, the attorneys for Defendant Valad requested the Court's

permission to file a Post Trial Brief after the Court Reporter had finished typing a complete transcript of all the testimony which was adduced at the trial which request the Court granted. All parties thereupon submitted Post Trial Briefs in support of their respective positions.

After carefully considering all testimony and evidence adduced, the oral arguments of counsel, and the Post Trial Briefs which were submitted, and the Court being fully advised in the premises and good cause appearing therefor, the Court now makes and enters the following:

Findings of Fact

1. That Plaintiff Mallory is a Utah corporation with its principal place of business in Salt Lake City, Utah; that Defendant Brown is a Utah corporation with its principal place of business in Salt Lake City, Utah; and, that Defendant Valad is a New York Corporation with its principal place of business in Tarrytown, New York.

2. That in the latter part of 1972 and the early part of 1973, Mallory had certain contract commitments to manufacture for and deliver to the United States Government some specially designed environmental units which required as part of their essential components some electrical heaters of precise and exacting specifications.

3. That during 1972, negotiations took place between Mallory and Brown regarding the possibility of Brown supplying heaters to Mallory which would meet the required specifications.

4. That in connection with these negotiations Mallory furnished Brown a document entitled "Electrical Heater Criteria" (Exhibit 4) which contained blank spaces thereon for various data including a blank space for the price Brown would charge Mallory for the heaters.

5. That after receiving the completed "Electrical Heater Criteria" from Brown, on December 14, 1972, Mallory issued its P.O. 4016 to Brown for the purchase of a 15 and a 21 KW heater assembly.

6. Thereafter on December 15, 1972, Brown issued its P.O. 6730 to Valad for the 21 KW heater assembly. On December 20, 1972, Brown supplemented its P.O. 6730 to Valad by a letter to Valad adding a 15 KW heater assembly and in which letter it enclosed Mallory's P.O. 4016.

7. Mallory's P.O. 4016 to Brown for the 15 and 21 KW heater assemblies provided in part as follows:

> ". . . Fabricator shall also submit written certification that sheath temperature will not exceed +250°F when operating at continuous full voltage with 5FPS air velocity and a maximum air temperature of +160°F (a maximum air temperature of +200°F for the 21 KW heater assembly . . ."

8. Brown's P.O. 6730 to Valad for the 21 KW heater assembly wasn't in the exact language of Mallory's P.O. 4016 to Brown for that same heater assembly but it did state:

". . . Subject to specifications and limitations of Mallory Engineering P. O. 4016 attached. Engineering Drawings and certification of NBFU compliance to be furnished 12/22 so duct fabrication can proceed."

9. In the December 20, 1972, Brown letter to Valad supplementing its P.O. 6730, Brown further amended the order by stating:

". . . Requirements same as heaters shown on original of our P.O. 6730 . . .

"Sheath temperatures must not exceed 250°F. Thermostats can be pre-set to 250°F to protect against over temperature . . .

"We are also enclosing a copy of Mallory's purchase order to us and a sketch that should have gone forward with our original purchase order, for your file."

10. Mallory was not furnished a copy of Brown's P.O. 6730 to Valad dated December 15, 1972, nor a copy of Brown's letter of December 20, 1972, to Valad supplementing its P.O. 6730 to Valad.

11. On December 26, 1972, Mallory issued its P.O. 4047 to Brown ordering some 50 and 12 KW heater assemblies from Brown.

12. On January 2, 1973, Brown issued its P.O. 6754 to Valad ordering a 50 and two 12 KW heater assemblies from Valad.

Findings of Fact and Conclusions of Law of the District Court of the State of Utah

13. On February 7, 1973, Brown issued its P.O. 7269 to Valad ordering two 36 KW heater assemblies from Valad.

14. On February 8, 1973, Mallory issued its P.O. 4241 to Brown ordering two 36 KW heater assemblies from Brown. This was a confirmation order confirming Mallory's prior oral order to Brown for the 36 KW heater assemblies it ordered from Brown.

15. The respective purchase orders specified the following delivery schedules: Mallory's P.O. 4016 to Brown dated 12/14/1972 for the 15 KW and the 21 KW heater assemblies provided: ". . . delivery guaranteed within 6 weeks ARO"; Brown's P.O. 6730 to Valad dated 12/15/72 for the 21 KW heater assembly provided: ". . . WHEN SHIP—1/24/72 or before"; Brown's letter of 12/20/72 to Valad adding the 15 KW heater assembly to Brown's P.O. 6730 didn't provide for a delivery date but merely referred to its P.O. 6730; Mallory's P.O. 4047 to Brown dated 12/26/72 for a 50 KW heater assembly and two 12 KW heater assemblies didn't provide for a delivery date but Brown's P.O. 6754 to Valad dated 1/3/73 for these same heater assemblies provided: ". . . WHEN SHIP—ASAP"; and, Mallory's P.O. 4241 to Brown dated 2/8/73 which was a "confirmation order" for two 36 KW heater assemblies didn't specify a delivery date but Brown's P.O. 7269 to Valad dated 2/7/73 for these same heater assemblies provided: ". . .WHEN SHIP—ASAP—6 weeks or before".

16. Valad did manufacture the 12, 15 and 21 KW heater assemblies. However, Brown instructed Valad to ship the same directly to Mallory.

Findings of Fact and Conclusions of Law of the District Court of the State of Utah

17. When the 12 KW heater assemblies were delivered by Valad to Mallory, they were found to be defective. These defective heater assemblies were replaced by Valad, however, and the replacement heater assemblies used by Mallory in one environmental unit.

18. The 15 and 21 KW heater assemblies were not delivered until after the dates specified for their delivery in Mallory's P.O. 4016.

19. When the 15 and 21 KW heater assemblies were delivered by Valad to Mallory they were installed by Mallory in two of the environmental units.

20. Under date of March 13, 1973, Valad issued a Certificate of Certification for the 15 KW heater assembly and a Certificate of Certification for the 21 KW heater assembly directly to Lee Farber of Mallory with copies to Carl Nyman of Brown which stated in part:

> ". . . sheath temperatures will not exceed +250°F when operating at continuous full voltage with a 5 FPS air velocity and a maximum air temperature of +160°F (a maximum air temperature of +200°F for the 21 KW heater assembly). Three safety hi-limit thermostats are pre-set at 225F to maintain sheath temperature at 250F."

21. Valad represented that the 36 and 50 KW heater assemblies which Mallory had ordered from Brown and which Brown in turn had ordered from Valad were in process and would be shipped April 5, 1973. These heater assemblies, however, were never shipped.

22. The 15 and 21 KW heater assemblies were tested by Mallory and the tests witnessed by Brown and the heater assemblies found to be defective in that they did not meet the specifications set forth in Mallory's P.O.s or in Valad's Certificates of Certification. The sheath temperatures were too high and the capacities too low.

23. Valad was notified by both Mallory and by Brown that the 15 and 21 KW heater assemblies did not meet required specifications. Valad was requested to take corrective action but Valad failed and refused to do so.

24. Because neither Valad nor Brown supplied Mallory with replacement heaters for the defective 15 and 21 KW heater assemblies and neither Valad nor Brown supplied Mallory with the 36 and 50 KW heater assemblies which Mallory ordered from Brown and Brown in turn ordered from Valad, it was necessary that Mallory secure the ordered heaters from another source which Mallory did costing Mallory additional direct costs and expenses totalling $11,493.80, but against which sum Brown should be allowed a credit of $846.00 for the 12 KW heater assemblies which Brown sold Mallory and which Mallory used but did not pay Brown for, leaving additional direct costs and damages sustained by Mallory totalling $10,647.80.

25. That besides the $10,647.80 in additional direct costs and damages sustained by Mallory for the failure and refusal of Brown and Valad to furnish Mallory with the ordered 15, 21, 36 and 50 KW heaters which would meet Mallory purchase order requirements and, the necessity of Mallory to secure these heaters from another source, Mallory in turn, sustained indirect costs or damages totalling

$30,840.60 as itemized in Exhibit "A" attached hereto and by reference made a part hereof, so that the total of both the direct costs and damages and the indirect costs and damages sustained by Mallory amounted to the sum of $41,488.40.

26. That as admitted by the Conditional Counter-Claim which Defendant Valad asserted against Defendant Brown, Defendant Brown paid Valad $2,242.00 on its Purchase Orders to Valad. However, as indicated in paragraph 24 above, only the 12 KW heater assemblies for a total of $846.00 were acceptable. Accordingly, Defendant Brown is entitled to recover against Defendant Valad in addition to the amount of any award granted Plaintiff Mallory against Defendant Brown, the sum of $1,542.10 being the difference between the amount already paid by Defendant Brown to Defendant Valad and the amount which Defendant Valad is entitled for the 12 KW heater assemblies or $699.90.

27. That in addition, by reason of Defendant Valad's failure to supply the ordered heater assemblies, Defendant Brown lost the anticipated profit to which it would have been entitled had the heater assemblies been supplied in the amount of $2,201.05. Thus, the total direct damages resulting to Defendant Brown by reason of Defendant Valad's failure to perform is $3,743.15.

From the foregoing FINDINGS OF FACT, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. That in the transaction evidenced by the testimony and exhibits adduced, Mallory was the buyer or vendee of

Brown and Brown was the seller or vendor of Mallory for some 12, 15, 21, 36 and 50 KW heater assemblies which Mallory ordered from Brown.

2. That in the transaction evidenced by the testimony and exhibits adduced, Brown was the buyer or vendee of Valad and Valad was the seller or vendor of Brown for some 12, 15, 21, 36 and 50 KW heater assemblies which Brown ordered from Valad but which said heater assemblies Brown instructed Valad to ship directly to Mallory but bill Brown.

3. That other than the 12 KW replacement heater assemblies delivered by Valad to Mallory which Mallory used, Brown breached its contracts with Mallory by which it obligated itself to sell Mallory some 15, 21, 36 and 50 KW heater assemblies meeting Mallory Purchase Order requirements as a direct and proximate result of which Mallory sustained direct damages totalling $10,647.80 and indirect damages totalling $30,840.60 or total damages of $41,488.40 for which total sum Mallory is entitled to judgment against Brown together with Mallory's costs incurred herein totalling $.....

4. That Valad breached its contracts with Brown by which it obligated itself to sell Brown some 15, 21, 36 and 50 KW heater assemblies meeting Brown Purchase Order requirements so that Brown is entitled to judgment over against Valad for the $41,488.40 damages plus the sum of $3,743.15 as the profit Brown would have made had Valad not breached its contract with Brown, together with Brown's costs incurred herein totalling $.....

Findings of Fact and Conclusions of Law of the District Court of the State of Utah

5. That Mallory is entitled to judgment against Valad for the sum of $41,488.40 damages Mallory sustained being a Third Party Beneficiary of the contract for the sale and purchase of the 15, 21, 36 and 50 KW heater assemblies between Brown and Valad, and also because Mallory was the party to whom Valad directly issued its Certificates of Certification that said heater assemblies would meet required specifications, together with Mallory's costs incurred herein totalling $.....

6. That the Counter-Claim and Cross-Claim of Defendant Valad should be dismissed.

7. That since the issues raised by the Amended Counter-Claim which the Court in its discretion allowed Defendant Brown to assert against Mallory and Mallory's Reply thereto do not involve Defendant Valad and can be heard and determined in a separate future proceeding between Mallory and Brown, the Court expressly reserves jurisdiction to hear and determine said Amended Counter-Claim at a future separate hearing after the parties involved have had time to make discovery and take other procedures with reference thereto as authorized by th Utah Rules of Civil Procedure. In view of the above the Court find that there is no just reason under Rule 54(b) of the Utah Rules of Civil Procedure which would warrant the Court in not making and entering the foregoing judgments in favor of Mallory against Defendants Brown and Valad or in favor of Brown over against Valad. However, since said Amended Counter-Claim, together with possible interest and costs amounts to a sum approximating $18,000.00, it is just and equitable and the Court so ORDERS that any supercedes bond on the total judgment herein granted

Mallory against Brown be reduced by $18,000.00 and that until said Amended Counter-Claim is heard and determined by the Court, Mallory be and is hereby enjoined and restrained from levying or executing on the first $18,000.00 of said judgment against Defendant Brown but may levy or execute on said judgment against Defendant Brown to satisfy said judgment in excess of the said first $18,000.00.

Let Judgments and Orders be entered accordingly.

DATED this 29th day of June, 1977.

By the Court:
s/ G. HAL TAYLOR
District Court Judge

Approved as to Form After

Court Hearing on Objections:

s/ 6-27-77
ALLEN H. TIBBALS
Attorney for Brown

s/ 5-2-77
ROBERT B. SYKES
Attorney for Valad

Exhibit "A"

Computation of Mallory's "Indirect Costs and Damages"

As shown by the copies of MALLORY's "Operating Statements" for 1973 and 1974 attached all inapplicable overhead expenses have been lined out and eliminated from the total expenses leaving only those items of overhead expenses directly related to the delay caused by the defective heaters which were furnished MALLORY and upon which revised "Operating Statements" the "indirect costs and damages" sustained by MALLORY have been calculated as set forth below:

JOB No. 281—*Total delay time of 133 days.*

Total direct overhead costs per day:

$$\frac{\$143,839.88}{365 \text{ days}} = \$394.23 \text{ per day}$$

Percent of total income:

$$\frac{\$\ 44,500.23}{\$456,229.62} = 9.75\%$$

Job No. 281—Direct overhead costs per day:

$\$394.23 \times 9.75\% = \$38.44$

Job No. 281—Total of "indirect costs and damages

$133 \text{ days} \times \$38.44 = \$5,112.52$

Exhibit "A"

JOB No. 277—*Total delay time of 112 days*

Total direct overhead costs per day:

$\$143,893.88 = \$394.23$ per day

365 days

Percent of total income:

$\$206,243.00 = 45.2\%$

$\$456,229.62$

Job No. 277—Direct overhead costs per day:

$\$394.23 \times 45.2\% = \$178.19$

Job No. 277—Total of "indirect costs and damages":

112 days x 178.19 — $19,957.28

JOB No. 285—*Total delay time of 70 days*

Total direct overhead costs per day:

$\$129,360.40 = \$354.41$ per day

365 days

Percent of total income:

$\$136,967.00 = 23.26\%$

$\$588,903.48$

Job No. 285—Direct overhead costs per day:

$\$354.41 \times 23.26\% = \$82.44$

Exhibit "A"

Job No. 285—Total of "indirect costs and damages":

70 days x $82.44 = $5,770.80

SUMMARY OF "INDIRECT COSTS AND DAMAGES":

Job No. 281	$ 5,112.52
Job No. 277	$19,957.28
Job No. 285	$ 5,770.80
TOTAL	$30,840.60

Plaintiff's Exhibit 20
(Exhibit "G")

[PHOTOSTATS]

(Opposite) ☛

SPEED LETTER

Ex 2C

TO Valed Electric Heating Corp.
71 Cortlandt Street
Tarrytown, N.Y. 10591

FROM Ted R. Brown and Associates also (83
P.O. Box 1356
1401 Major Street
Salt Lake City, Utah 84105

SUBJECT 2 heaters, 15KW & 21KW, P.O. 673c

OLD (10 21kw 21 KW) (15KW) MESSAGE 10.21kw DATE 1/26 19 7:

The [redacted] 73-119 & 73-120 for the subject heaters, hav
ecen [redacted] by Mallory Engineering and [redacted]
subject to the following: Since each insert will have 3 st.
with [redacted] for each, or a total of 9 for eac
set. This is as detailed in your Dec. 14, 1971 letter
[redacted] However, 200° F is
much too low since entering air is 200° F in one case.
Else, all penetrations in flenges must be fully sealed for ext.
atmosphere in duct. Mallory will weld into duct to seal and
mount. Please proceed with immediate production and advi
ship. date — they should be here Nov. Latest date
conformance to class A group D must accompany shipment; pur
chase order as issued. Thanks. Carl Nymon 19

73-119a 73-120 : Copies To Dan/Jeff/Tony

Get out Immed.

Made Copies of this, Dan/Jeff

2-273 - Shelf Item 1ea-15 KW
ea 73-120- 21 KW

By Factory Air Freight

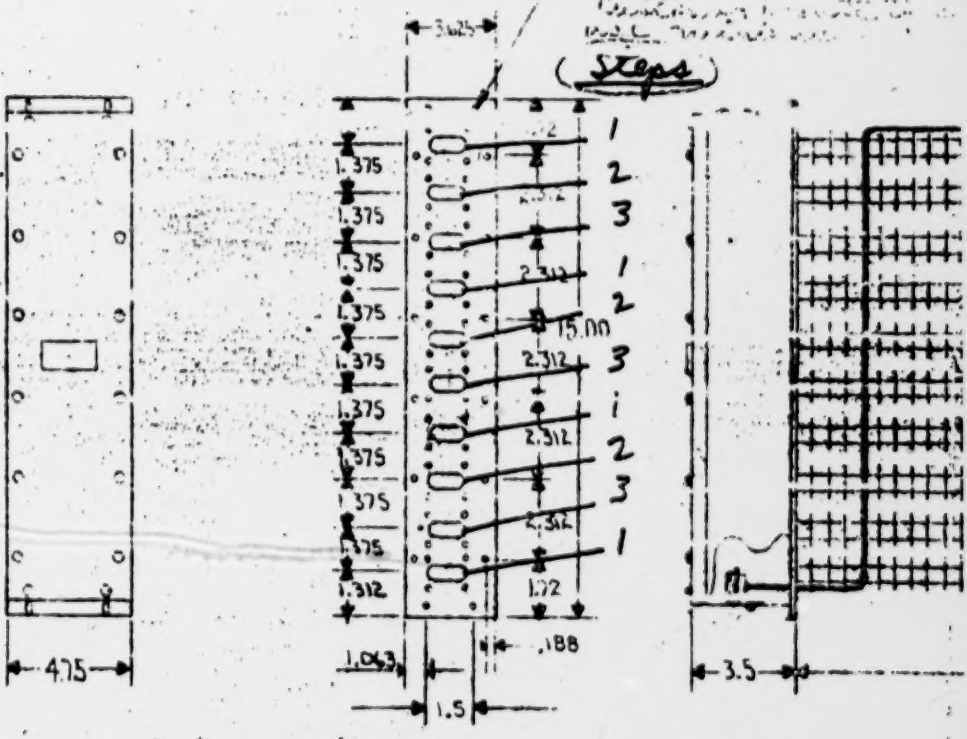
15KW & 21 KW Mallory Engineering M Mallory will be
Refer Call Tuesday Sign for Heaters

Both still working 3 more Tuesday
each 6x50 KW

2-20-1

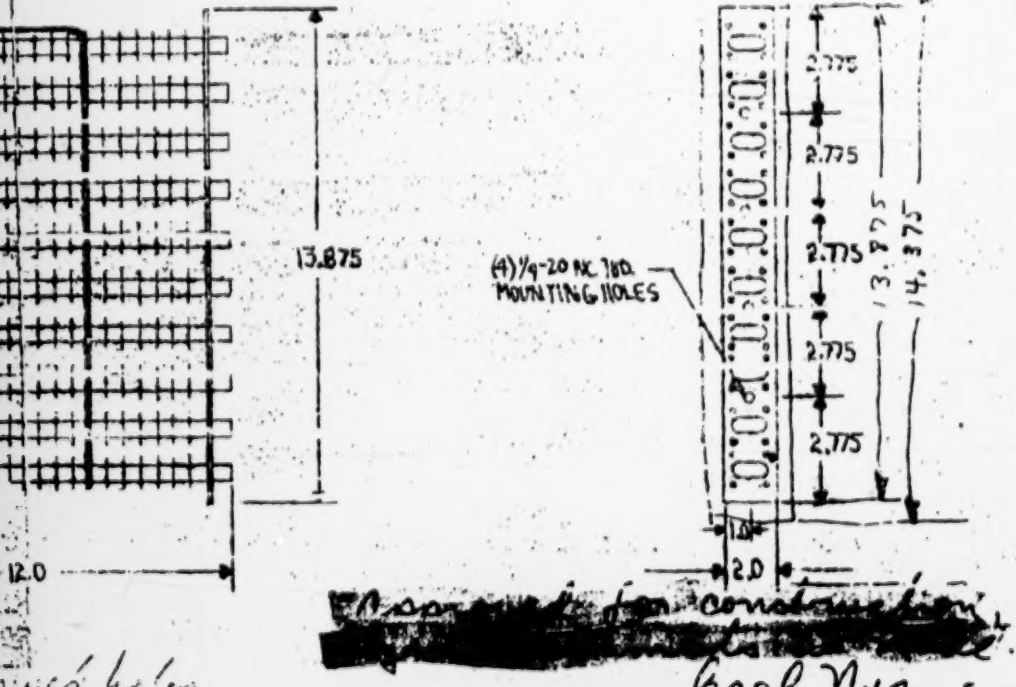
RETAIN WHITE COPY. RETURN PINK COPY.

letter to Mallory stating OK for Class I, Group D usage must accompany shipment, per purchase order.



Terminal bkt open bottom -- screw down to [illegible] in mtg. fig. as shown. Add mtg. fig. to [illegible] fig. & screw edge of cutout.

S/B
9 Total on 3 inserts, per 12/22 letter.



REVISIONS		
NO	DATE	BY
1		
2		
3		
4		
5		

VALAD ELECTRIC HEATING CORP
TARRYTOWN NY 10591

INSERT DUCT HEATER
208VOLTS 7EAKW 3 PH

DRAWN BY	SCALE	MATERIAL
OC	N.T.S	SS
CHK'D	DATE 1-73	DRAWING NO
TRACED	APP'D	73-119